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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 214.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

FILED JULY 11, 1879.

SUPREME COURT OF THE UNITED STATES.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Wyoming, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court before you, between the Union Pacific Railroad Company, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said United States of America: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings
2 aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of next October, A. D. 1879, on the 13th day thereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 27th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

J. W. BREMER,
Clerk Supreme Court, Wyoming Territory.

(Indorsed:) The Union Pacific Railroad Company vs. The United States of America. Writ of error. Filed June 27th, 1879. J. W. Bremer, clerk supreme court.

3 Be it remembered that heretofore, to wit, *that* on the 3rd day of April, A. D. 1879, there was filed in the clerk's office of the supreme court of the Territory of Wyoming a writ of error and transcript in the words and figures following, to wit:

TERRITORY OF WYOMING, *ss:*

In supreme court.

To the honorable Jacob B. Blair, judge of the district court of the second judicial district of said Territory, sitting within and for the county of Carbon, in the name of the Territory of Wyoming:

Because in the record and proceedings, as also in the rendition of the judgment, in a certain cause which is in the said district court before you, between the United States of America, plaintiff, and The Union Pacific Railroad Company, defendant, a manifest error, as is al-
4 leged, hath happened to the great damage of the said The Union Pacific Railroad Company, and we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, you are therefore commanded, if judgment be therein given, that under your seal distinc'ly and openly you send a transcript of the record and proceedings containing the final judgment or order sought to be reversed, vacated, or modified,

with all things concerning the same in the cause aforesaid, to the supreme court of said Territory, together with this writ, so that you may have the same at Cheyenne City, in said Territory, on the 27th day of March, A. D. 1879, in the said supreme court, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right and according to the laws should be done.

5 Witness the honorable J. W. Fisher, chief justice of the said supreme court, and the seal thereof this 17th day of March, A. D. 1879.

SUPREME COURT SEAL WYOMING TERRITORY.

J. W. BREMER,
Clerk Supreme Court,
Wyoming Territory.

Endorsed on the back as follows: Supreme Court. Doc. 1. No. 150. Union Pacific R. R. Co., plaintiff in error, vs. United States of America, defendant in error. W. R. Steele, pl'ff in error' att'y.

Service of a copy of writ of error waived.

E. P. JOHNSON,
Attorney for Defendant in Error.

APRIL 1st, 1879.

Bill of exceptions.

TERRITORY OF WYOMING,
County of Carbon:

In the district court of the second judicial district.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE UNION PACIFIC RAILROAD CO., DEFENDANT.

6 Bill of exceptions.

Be it remembered that heretofore, to wit, on the twentieth day of November, A. D. 1877, a petition was filed in the office of the clerk of the district court in the second judicial district in and for the county of Carbon, in the Territory of Wyoming, in the words and figures following, to wit:

Petition.

In the district court of the 2nd judicial district of Wyoming Territory, in and for Carbon County, sitting.

THE UNITED STATES OF AMERICA, PL'FF,
vs.
THE UNION PACIFIC RAILROAD COMPANY, DEFENDANT.
} Petition.

The United States of America, plaintiff, complains of the Union Pacific Railroad Company, a corporation organized and acting under the laws of the United States of America, defendant.

7 For that the said plaintiffs are owners of the following described goods and chattels, to wit, 3 cases 6 bales dry goods, 4 cases shirts, 3 cases 3 packages hardware, 1 case of hats, 669 awls in cases, 1 case tin cups, 4 cases hatchets, 505 handkerchiefs, 1 case coats, 1 case axe-handles, 9 boxes camp-kettles, 9 bales 2 cases blankets, 2 cases clothing, 2 cases hats, 3 p'k'gs drugs, and is entitled to the immediate possession of the same; and that the said defendant wrongfully and unjustly retains in his possession the said goods and chattels, and from the said plaintiff; and said plaintiffs further aver, that defendant did so wrongfully detain the possession of said goods and chattels for the space of sixty days next before the commencement of this suit, and wholly deprived the said plaintiff of all use and benifit thereof during all said time, to the damage of said plaintiffs in the sum of five hundred dollars.

8 Wherefore plaintiffs pray an order against the said defendant, that he may be ordered to deliver to said plaintiff the said goods and chattels, and also a judgment against the said defendant for the said sum of five hundred dollars, their damages sustained by reason of the unlawful detention thereof.

EDWARD P. JOHNSON,
Att'y for Pl'ff.

Which said petition was endorsed as follows: "United States vs. The Union Pacific Railro'd." Petition filed Nov. 20, 1877. J. W. Meldrum, clerk. J. B. Adams, deputy.

And afterward, on the same day, an affidavit for replevin was filed in the said cause, which was in the words and figures following, to wit:

Affidavit for replevin.

In the district court of the 2nd district of Wyoming Territory, in and for Carbon County, sitting.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
THE UNION PACIFIC RAILROAD COMPANY, DEFENDANTS.

9 Edward P. Johnson being duly sworn according to law, deposes and says he is attorney for the United States of America, plaintiffs in this action; that plaintiffs have commenced in the above-named court, and in Carbon, Wyoming Territory, a civil action against the Union Pacific Railroad Company, a corporation organized and acting under the laws of the United States of America, to recover possession of the following specific personal property, to wit:

3 cases 6 bales dry goods, 4 cases shirts, 3 cases, 3 p'k'ges of hardware, 1 case hats, 669 awls in cases, 1 case tin cups, 4 cases hatchets, 505 h'dk'fs, 1 case of coats, 1 case axe-handles, 9 boxes camp-kettles, 9 bales, 2 cases blankets, 2 cases clothing, 2 cases of hats, 3 packages of drugs, and that the said plaintiffs are owners of the said goods and chattels, and entitled to the immediate possession of the same.

And that said goods and chattels are wrongfully detained from them by said defendants, and *and* that said goods and chattels were not taken on execution on any order or judgment against said plaintiff or for

the payment of any tax, fine, or amercement assessed against them, or by virtue of an order of delivery issued under title 8 of the code of civil procedure of Wyoming Territory, or any other mense or final process issued against the plaintiff.

EDWARD P. JOHNSON.

Sworn to before me this day of November, A. D. 1877.
[SEAL.]
HOMER MERRELL,
Notary Public.

Which said affidavit for replevin was endorsed as follows: "United States vs. The Union Pacific Railroad Co." Affidavit for replevin; filed Nov. 20, 1877. J. W. Meldrum, clerk. J. B. Adams, deputy.

And on the same day an undertaking in replevin was filed in the said cause, which was in the words and figures following, to wit:

Undertaking in replevin.

In the district court of the 2nd judicial district of Wyoming Territory in and for Carbon County sitting.

THE UNITED STATES OF AMERICA, plaintiff,
vs.
THE UNION PACIFIC RAILROAD COMPANY, defend'nt.

Whereas the United States of America has caused an order of delivery of the following goods and chattels, to wit: 3 cases 6 bales of dry goods, 4 cases shirts, 3 cases 3 p'k'g's of hardware, 1 case of hats, 669 awls in case, 1 case of tin cups, 4 cases hatchets, 505 handkerchiefs, 1 case of ax-handles, 9 boxes camp-kettles, 9 bales 2 cases blankets, 2 cases of clothing, 2 cases of hats, 3 p'k'g's of drugs, to be issued out of the clerk's office of the above-named court in a cause now pending in said court wherein the said The *said The* United States of America are plaintiffs and the Union Pacific Railroad Company is *plaintiff;* and whereas the said order was delivered to the sheriff of said county of Carbon and the said sheriff has taken said goods and chattels, and the same have been valued by two responsible persons, under oath,
at the sum of $4,951\frac{00}{100}$ *dollars.*

Now, therefore, we, E. P. Snow and James France, undertake to the said Union Pacific Railroad Company, defendant in said action, in the penal sum of fifteen thousand dollars, that said plaintiffs shall duly prosecute their action aforesaid, and pay all costs and damages that may be awarded against them.

Dated November 20th, A. D. 1877.

E. P. SNOW.
JAMES FRANCE.

Approved November 20th, A. D. 1877.

I. M. LAWRY,
Sheriff Carbon Co.

Which said undertaking in replevin was endorsed as follows: "United States vs. The Union Pacific Railroad." Undertaking in replevin. Filed Nov. 20, 1877. J. W. Meldrum, clerk. J. B. Adams, deputy.

And thereafter and on the same day a writ of replevin was
13 issued in the said cause, which writ of *of* replevin and the return of the sheriff therein is in the words & figures following, to wit:

Sheriff's return on writ of replevin.

TERRITORY OF WYOMING,
County of Carbon, ss:

I hereby certify that I received the within order of delivery and replevin writ on the 20th day of November, A. D. 1877, at 11 o'clock a. m., and according to the commands of the within order, I have this day taken the within-named goods and chattels and have caused the same to be valued by the oaths of H. F. Errett and William Grenger, two citizens and householders and responsible persons of said county, whose oaths and valuation in writing is herewith returned, and I have delivered the said goods and chattels to the said plaintiff, and have taken the undertaking of E. P. Snow and James France, sureties of the said plaintiff, in the sum of fifteen thousand dollars, which undertak-
14 ing is also herewith returned. I also delivered a certified copy of the within order of delivery and writ of replevin to Joseph B. Adams, the agent of The Union Pacific Railroad Company, defendant, at Rawlins, Carbon County, Wyoming Territory, on the 20th day of November, A. D. 1877, the president, chairman of the board of directors or trustees, or other chief officer not being found in Carbon County.

Given under my hand this 20th day of November, A. D. 1877.

I. M. LAWRY,
Sheriff of Carbon County.

Writ of replevin.

TERRITORY OF WYOMING,
County of Carbon, ss:

To the sheriff of Carbon County, greeting:

Whereas Edward C. Johnson, att'y for the United States of America, has made affidavit before J. W. Meldrum, clerk of the district court of the second judicial district of the Territory of Wyoming, sitting in Rawlins, in Carbon County, for the trial of causes arising under
15 the laws of said Territory, that he is the owner or has special ownership or interest in and is entitled to the immediate possession of the following described property, to wit, 3 packages of drugs, 3 cases 6 bales dry goods, 4 cases of shirts, 3 cases 3 packages of hardware, 1 case of hats, 669 awls in cases, 1 case of tin cups, 4 cases of hatchets, 505 hd'k'ch'fs, 1 case of coats, 1 case of axe-handles, 9 boxes camp-kettles, 9 bales 2 cases of blankets, 2 cases of clothing, 2 cases of hats, and that the said plaintiffs have commenced in the above-named court, and in Carbon Co., Wyo. Terr'y, a civil action against the Union Pacific Railroad Company, a corporation organized and acting under the laws of the United States of America, to recover possession of the foregoing mentioned specific personal property. That said property is wrongfully detained by the said defendant. And that the said goods and chattels were not taken in execution of any order or judg-
16 ment against said plaintiff, or for the payment of any tax, fine, or amersement assessed against him, issued under title 8 of the code of civil proceedure of Wyo. Terr'y, or by virtue of an order of delivery or any other mense or final process issued against said plaintiff:

You are therefore commanded to take the above-described property and deliver it to the said plaintiff, if he shall give bond and security according to law.

And make due return of this writ according to law on the 3d day of Dec., A. D. 1877.

Witness J. W. Meldrum, clerk of the said court, and the seal thereof at Rawlins, this 20th day of November, A. D. 1877.

[SEAL OF COURT.] J. W. MELDRUM,
Clerk District Court.

(Indorsed:) Carbon County district court. The United States of America vs. The Union Pacific Railroad Company. Writ of replevin. Filed Nov. 20th, 1878. J. W. Meldrum, clerk, J. B. Adams, deputy clerk. Sheriff's fees. Edward P. Johnson, plaintiff's attorney.

17 And afterwards, on the same day, there was filed in the said cause the oaths of the appraisers and the inventory and valuation of the property taken in replevin in the said cause, which is in the words & figures following, to wit:

Oath of appraisers and valuation.

TERRITORY OF WYOMING,
County of Carbon, ss:

We, the undersigned householders and citizens of Carbon County, having been selected by I. M. Lawry, sheriff of said Carbon County, to value the goods and chattels hereinafter named, taken on an order of delivery in the case of the United States of America, plaintiff, vs. The Union Pacific Railroad Company, defendants, do, after being first duly sworn to truly assess the value of the said goods & chattels, value said goods and chattels as follows:

3 packages of drugs,	valued at		$ 150 00
3 cases 6 bales dry goods,	"	"	1,000 00
4 cases shirts,	"	"	500 00
3 cases 3 p'c'k'ges. hardware,	"	"	300 00
1 case of hats,	"	"	75 00
18 669 awls in cases	valued at		15 00
1 case tin cups,	"	"	15 00
4 cases hatchets	valued at		72 00
505 handkerchiefs			15 00
1 case of coats			200 00
1 case of axe-handles			25 00
9 boxes camp-kettles			54 00
9 bales 2 case' blankets			1,980 00
2 cases of clothing,	valued at		400 00
2 cases hats			150 00

We value the whole of said goods and chattels at the said sum total, $4,951.00.

Given under our hands this 20th day of November, A. D. 1877.

(Signed.) H. F. ERRITT.
WILLIAM GRENGER.

TERRITORY OF WYOMING,
County of Carbon, ss:

We, H. F. Errett and William Grenger, being first duly sworn, do depose and say each for ourselves, and not one for the other, that we

are citizens and householders of Carbon County; that we will
19 duly assess and value the goods and chattels taken on an order of delivery, in the case of the United States of America, plaintiff, and The Union Pacific Railroad Company, defendant.

H. F. ERRETT.
WILLIAM GRENGER.

Subscribed and sworn to before me this 20th day of November, A. D. 1877.

I. M. LAWRY,
Sheriff Carbon Co.

Which said oath of appraisers and valuation was endorsed as follows: United States of America vs. The Union Pacific Railroad Company. Oath of appraisers and valuation. Filed Nov. 20th, 1877. J. W. Meldrum, clerk, by J. B. Adams, deputy.

And thereafter, on the 15th day of January, A. D. 1878, there was filed in the said cause the answer of said defendant, which was in the words and figures following, to wit:

TERRITORY OF WYOMING,
County of Carbon, ss:

20 *Answer.*

In the district court of the second judicial district.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE UNION PACIFIC RAILROAD CO., DEFENDANT. } Answer.

Now comes the said defendant, The Union Pacific Railroad Company, and for answer to the petition of the said The United States of America says:

First. That it denies each and every of the allegations stated and contained in the said petition, except that the said defendant is a corporation as therein alleged.

And of this the said defendant puts itself upon the country.

Second. And the said defendant, for a further answer to the petition of said plaitiff, says that it is a common carrier of goods and merchandise for hire and reward from the city of Omaha, in the State of Nebraska, to the town of Rawlins, in the Territory of Wyoming;
21 that as such common carrier it received the said goods and chattels in the plaintiff's petition mentioned, long prior to the commencement of this action herein, at Omaha aforesaid, from one Dwight J. McCann, who was then lawfully in the possession and control of the said goods and chattels, for transportation to Rawlins, in the Territory of Wyoming; and that thereafter, as a common carrier, the said defendant carried and transported the said goods and chattels from said Omaha to said Rawlins; that under and by virtue of the contract under which the said goods and merchandise were carried and transported the said defendant was to have the right to retain the possession of the said goods, chattels, and merchandise, and of each and every part thereof, until its charges for the carriage, transportation, and storage

of the same should be fully paid and discharged. And the said defendant says that its charges for the carriage, transportation, and storage of said goods, wares, and merchandise, nor any part thereof, has ever been paid; that its charges, as aforesaid, on the
22 20th day of November, A. D. 1877, amounted to the sum of five hundred and eighty-eight dollars and sixteen cents, to wit, for freight and transportation four hundred and ninety-six dollars and eighty-six cents, and ninety-one dollars and thirty cents for storage. And the said defendant further says that on the 20th day of November, A. D. 1877, under and by virtue of the contract aforesaid and under its lien as a common carrier it had a special ownership in the said property, goods, wares, and merchandise in the plaintiff petition mentioned and in each and every part thereof, and on said day was entitled to the possession of the said property and of each and every part thereof.

Wherefore the said defendant says that the said plaintiff wrongfully and unlawfully deprived the said defendant of the possession of the property in the plaintiff's petition mentioned to the damage of the said defendant in the sum of five hundred and eighty-eight dollars and sixteen cents.

23 And the said defendant prays judgment against said plaintiff for said sum of $588.16, with interest thereon since the 20th day of November, A. D. 1877, and costs of this action.

W. R. STEELE,
Attorney for Defendant.

(Indorsed:) No. 135. The United States of America vs. The Union Pacific Railroad Co. Answer filed Jan. 15th, 1878. J. W. Meldrum, clerk, by J. B. Adams, deputy. W. R. Steele, attorney for defendant.

The foregoing petition, affidavit in replevin, writ of replevin, undertaking in replevin, appraisement, and other proceedings on replevin, and the answer embrace all the pleadings and papers of record, and raising the issues for trial in the cause therein.

24 And thereafter and on the 9th day of September, A. D. 1878 there was filed in the said cause a stipulation as to the trial of said cause, the entry of judgment, etc.; which said stipulation was in the words and figures following, to wit:

Stipulation.

TERRITORY OF WYOMING,
County of Carbon, ss:

In the district court of the second judicial district.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE UNION PACIFIC RAILROAD CO., DEFENDANT. } Stipulation.

It is hereby stipulated and agreed upon by and between the parties to this action, by their respective attorneys, that the trial of the issues and questions arising in this case shall be had before Hon. J. B. Blair, presiding judge of said court, at chambers in the city of Laramie,
25 in said district, on the 16th day of September, A. D. 1878, or at such other time as may be agreed upon. That the judgment of

the court in this action shall be rendered and entered as of the September term, A. D. 1878, of the said court with the right preserved to either party to except to any decision, order, or judgment of said court entered, ordered, or made on the trial of this cause.

And either party desiring so to do may present to said court its bill of exceptions herein at any time prior to the first day of the next ensuing term of this court, to which time leave is given to present such bill of exceptions for allowance, and if said bill of exceptions shall be presented at any time prior to the first day of the next ensuing term of this court, it shall be signed, sealed, and allowed, and made of record as of the September, A. D. 1878, of this court.

Rawlins, Wyo., September 9th, 1878.

E. P. JOHNSON,
Attorney for Pl'ff.
W. R. STEELE,
Attorney for Defendant.

26 (Indorsed:) No. 135. The United States of America vs. The Union Pacific Railroad Company. Stipulation. Filed Sept. 9th, 1878. J. W. Meldrum, clerk, by J. B. Adams, deputy. W. R. Steele, attorney for defendant.

And thereafter, and on the 9th day of September, A. D. 1878, there was filed in the said cause a stipulation and agreed statement of facts in the case which was in the words and figures following, to wit:

TERRITORY OF WYOMING,
County of Carbon, ss:

In the district court of the second judicial district.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE UNION PACIFIC RAILROAD COMPANY, defendant.

27 *Stipulation and agreed statement of facts.*

It is hereby stipulated and agreed by and between the said The United States of America, plaintiffs, by E. P. Johnson, its attorney, and The Union Pacific Railroad Company, defendant, by W. R. Steele, its attorney, that the facts in this case are as follows:

The goods replevied in this action are the property of the United States, furnished for the Indian service.

That one Dwight J. McCann had a contract with the United States for the transportation of goods replevied and of other goods from the city of New York and other points, to the White River Indian Agency, in Colorado. That as such contractor the possession of said goods was delivered to said Dwight J. McCann, who was lawfully in possession of the same, being the goods replevied.

That said Dwight J. McCann made a contract with the defendant, The Union Pacific Railroad Company, to transport and carry the goods replevied in this action and other goods from Omaha, in the State
28 of Nebraska, to Rawlins, in the Territory of Wyoming.

That the defendant carried the goods replevied as a common

carrier from said Omaha to said Rawlins, for which its proper charges were the sum of four hundred and ninety-six dollars eighty-six cents.

That the goods replevied were stored in the warehouse of the defendant at Rawlins, Wyoming, for a long period of time, for which the proper charges of the defendant for storage was the sum of ninety-one dollars and thirty cents.

That on the 20th day of November, A. D. 1877, the proper charges of the defendant for the transportation and storage of the goods replevied in this action was the sum of five hundred and eighty-eight dollars and sixteen cents.

That no part of said charges has ever been paid either by the said Dwight J. McCann or the plaintiff, The United States of America, and no tender of the sum so due or any part thereof, was ever made to the defendant before the commencement of the action herein and
29 the taking of the said goods from the possession of the defendant on replevin.

That the goods of the plaintiff previously carried by the defendant under said contract with said McCann had always been held by it until its charges thereupon had been paid by said McCann.

That the appraised value of the property taken on replevin in this action is the sum of four thousand nine hundred and fifty-one dollars.

That the defendant claimed the right of lien as a common carrier upon the goods replevied, and the right to hold the possession of the same until the charges for the transportation and storage of said goods replevied should be paid.

That the United States refused to pay defendant its said charges or any part thereof.

It is agreed that had the goods replevied been the property of said Dwight J. McCann, the defendant would have had a lien thereon for its said charges for freight and storage, and a right to hold pos-
30 session of said goods until its said charges were paid.

The question submitted to the court is:

The property replevied being the property of the United States, is and was the defendant entitled to a lien upon said property for its charges, and a right to hold possession of the same until its charges were paid.

If the court shall find, upon the facts, that the defendant had and was entitled to a lien, and was entitled to the possession of the goods at the time they were replevied, and that the court has authority to render judgment herein against the plaintiff, then judgment should be in favor of defendant and against the plaintiff and sureties for the said sum of five hundred and eighty-eight dollars and sixteen cents and interest.

Should the court, upon the facts, find that the defendant was not entitled to such lien and could not hold possession of said property
31 replevied until its charges were paid, then judgment should be in favor of the plaintiff and against the defendant.

The parties expressly waive their right to trial by jury and agree to try this cause by the court.

E. P. JOHNSON, *Attorney for Plaintiff.*
THE UNION PACIFIC RAILROAD COMPANY,
By W. R. STEELE, *Its Attorney.*

RAWLINS, WYOMING,
September 9th, 1878.

Which said agreed statement of facts contained the evidence and all the evidence submitted to or before the court on trial of the issues arising in said cause.

(Indorsed:) No. 135. The United States of America *vs.* The Union Pacific Railroad Company. Stipulation and agreed statement of facts. Filed September 9th, 1878. J. W. Meldrum, clerk, by J. B. Adams, deputy. W. R. Steel, attorney for defendant.

32 And thereafter the court rendered judgment in said cause as of the September term, A. D. 1878, of the said court; which judgment and the findings of said court were in the words & figures following, to wit:

Findings of court.

In the second judicial district.

THE UNITED STATES OF AMERICA
vs.
THE UNION PACIFIC RAILROAD COMPANY.

The trial of this cause has been submitted by the parties to the action to the court upon agreed statement of facts.

The question presented and upon which the decision of the court is invoked is whether the property replevied, being the property of the United States, is and was the defendant entitled to a lien upon said property for its charges and a right to hold possession of the same until its charges were paid. Should the court decide this question in the affirmative, then the court is asked to decide the question whether it has the authority to render judgment herein against the plaintiff.

33 This being an action of replevin two things must be shown to entitle the plaintiff to recover:

First. That it was the owner of the goods in question, or had a special ownership therein, and that it was entitled to the immediate possession of the property at the time the goods were replevied.

Second. That the property was wrongfully detained by the defendant.

Inasmuch as it is agreed that the property in controversy was the property of the United States, that question I will regard as settled. It is also admitted that the plaintiff did not undertake itself, through its agencies, to transport its goods to the White River Agency in Colorado, but entered into a contract with a stranger, one D. J. McCann, to deliver said goods at the place above mentioned. This is all that is disclosed as to the provisions of said contract, except that McCann was lawfully put into possession of said goods for the purpose aforesaid.

34 Before proceeding to discuss the point of law involved in the case, I wish to say that it would seem, from the form of the question propounded to the court in the agreed statement of facts, that the parties to the action desired to submit to the court the abstract question whether, in any case, a common carrier can have a lien on the goods of the United States.

Had the words now under the foregoing agreed statement of facts immediately proceeded the question propounded to the court, no such inference as suggested above could have legitimately been drawn or infer'ed. However, in considering the point submitted to the court, I

have taken the most reasonable view of the matter as to the intention of the parties, and have regarded the question not as an abstract one, but to be decided and determined in view of the agreed statement of facts.

The counsel for the plaintiff rests his case solely on the proposition that the ordinary lien of a common carrier does not attach to goods the property of the United States, and therefore, inasmuch as the
35 property replevied in this case was the property of the United States, no lien of the defendant attached or could attach whereby the defendant as a common carrier could legally withhold the possession of the same from the plaintiff until all charges for transportation and storage were paid.

This proposition of counsel rests upon another, namely:

That exception as to the operation of liens has always been made in regard to the goods of all governments and sovereignties; for the reason that it constitutes a known p'erogative of governments and sover'ignties. That if such exception did not exist the operations of the government or sovereignty might, and probably would, often be subjected to wishes and caprice of common carriers. If this last proposition be true, it necessarily carries with it the former, and the law must be declared to be with the plaintiff, for it will be observed that the proposition contended for by counsel is broader and goes much further than the one submitted to the court under the agreed statement of facts.

36 If, however, it is untenable and unsound, the plaintiff's case is as worthless as a rope of sand, and consequently the law is with the defendant.

I had supposed until this case arose that the question here involved had long been settled by repeated decisions in the highest courts of the country; and I confess my great surprise when I learned from counsel who a'gr*e*ed this case that such was not the fact. It would seem as if an inscru*i*table Providence had so ordered it that this question should remain an open one in order that some country lawyer promoted to the bench, residing in some wild western territory, with little more to aid him in his herculean task than a volume of the Compiled Laws of the Territory of Wyoming, should be able to cut the Gordean knot and thereby gain immortal fame by finding a happy and satisfactory solution of this most difficult of all questions.

Pardon this seeming digression. I will return to the consideration of the question involved in the case, viz: It is true that it is an
37 acknowledged p'erogative of all governments and sovereignties to be exempt from the lien of a common carrier, or, in other words, that no lien exists or can exist upon its goods for services rendered by transporting the same. In the case of The United States vs. James Wilder, reported in third Sumner Massachusetts Reports, Justice Story argues this question with his usual ability at considerable length, but declines to express a decided opinion thereon. But, at the same time, it is difficult to read his able opinion and to avoid the conclusion that he believed that no such exemption could be claimed as a prerogative of any government or sovereignty whatsoever. Hear him: "The question," he says, "is whether a like lien exists in regard to goods belonging to the United States. No case has been cited in which any exception has ever been made in regard to the United States, nor has any authority been produced to show that it constitutes a known prerogative of any government or sovereignty.

38 "I have examined," continues the learned judge, "the treaties

upon the prerogative of the Crown of England and I do not find it there, or in any of the great abridgements of the law under the title prerogative any such exceptions recognized or even alluded to." And in another place the learned judge adds, that "the very reasons that the advocate' of this doctrine advance to sustain their position are the very ones that would drive me to the opposite conclusion." I confess, while reading the whole of what the learned judge said on this important question, in discussing another bearing to some extent on the one we are considering, I felt like saying to him, as Agrippa said to Paul, "Thou reasonest well."

Assuming that the seeming position taken by Justice Story on this question be correct, from what power or authority, let me ask, does the exception flow? Certainly not from the Constitution of the United States, for it is silent on the subject; not from the action of Con-
39 gress, for it has passed no law in reference thereto; nor from the organic act of the Territory, for the power creating liens has not been withheld from the legislature by Congress in that instrument. The conclusion would, therefore, seem inevitable that there is no express law relieving the goods of the United States from the ordinary lien of a common carrier.

No one, I take it, will deny that there are times in the history of every government or sovereignty when, by reason of intestine strife, rebellion, or war, *when* all laws but that of necessity are virtually suspended; when the rights of individuals must yield to the public welfare; when even the Constitution itself becomes as a piece of rubber in the hands of man—forced to expand and contract as the emergency of the hour may require. But no such state of things existed at the time the goods in controversy were replevied. Peace, with all that word implies, reigned supreme throughout the land; the Indian sat in his forrest home with his cup of happiness full to overflowing, save the
40 growling of an empty stomach, which this great and beneficent government of ours had pledged its faith to him should never occur. In considering this question, therefore, we have a right to take judicial notice that the latter and not the former state of things existed. With these observations as to the general doctrine of the prerogative of governments and sovereignties I will, without further delay, consider the case at bar as presented under the agreed statement of facts.

As I have heretofore stated, the goods in question were the property of the United States. This is admitted; it is also admitted that the United States made a contract with D. J. McCann to deliver the goods at the White River Indian Agency, in Colorado, and for this purpose put McCann in lawful possession of the same. McCann brought the goods as far as Omaha, in the State of Nebraska, at which point he employed the U. P. R. R. Co. to transport them to the picturesque and world-renowned city of Rawlins, in the county of Carbon, Wyoming Territory.

41 McCann forgetting or neglecting to pay the charges of the company for transporting and storing the goods, the company held possession of the same, claiming the lien of a common carrier to the extent of its charges. At this juncture or crisis of affairs, the United States, through its then able attorney, replevied said goods; hence this suit. Now, while it is true that the plaintiff's right to the immediate possession of said goods is involved in this case, yet under the agreed statement of facts that question is finally disposed of when the question as to the defendants supposed lien is determined.

Independent of the agreed statement of facts it might be contended I take it, that the United States having parted with its goods until they should be delivered or arrive at the Indian agency in Colorado, could not claim that it was entitled to the immediate possession of them while in transit, but that question and the further question, whether
42 the defendant in an action of replevin in order to defeat the plaintiff, can be permitted to show that a third party, and not the plaintiff, has the right to the immediate possession of the goods in controversy, I am not called upon, for the reason aforesaid, to decide. Returning again to the only question to be considered, I would say that I have only been able to find but one case bearing directly on the point in issue; that is the case of Dufult vs. Gorman, reported in the first volume Minnesota Reports. The opinion of the court was delivered by Justice Sherburne. This was an action brought by the plaintiff to recover a sum of money which he alleged to be due him for hauling a quantity of goods, the property of the United States, from a place called Watab, in the Territory of Minnesota, to St. Paul. It is not clear by any means that the question of liens was properly before the court or necessary for the court to decide, but the court thought it was and decided the plaintiff acquired no lien upon the goods to the
43 amount of his services in transporting them.

The learned judge who delivered the opinion of the court cites no authority to support his decision on the question of lien, and had he given less reasons for his decision he would have remained silent. He contents himself by saying that individuals obtain no lien upon *upon* property of the government as security for their services, such a power might often subject the operations of the government to the wishes and caprice of common carriers, and dismiss that branch of the subject by adding that it now needs no argument to prove that he is correct. I am frank to admit that this is a very convenient, if not ingenious, way to dispose of a troublesome question when reasons for the ruling are almost entirely absent and authority cannot be found to support it. Apply the iron rule laid down in this case for the transportation of government goods, and the result is that the rights
44 of individuals are no more nor no less in time of peace than in war. Individual rights, which should be sacredly observed and protected by the government in all cases except in the contingency I have heretofore referred to, a*nd* to be regarded as of no moment, and that, too, by a government professing to be a government of justice, created by the people and for the people. The bare annunciation of such a doctrine is sufficient, were it possible, to cause that section found within the lids of the Compiled Laws of Wyoming, and which the courts are admonished to keep constantly in view, known as substantial justice, to bid adieu to the people of this Territory and take the wings of the morning.

In order that we may see more clearly the injustice that must necessarily result from a universal application of the rule laid down in the case last referred to, let us take case at bar. In this case the government does not attempt through its own agents to transport
45 its goods, but contracts with a stranger to do so, one who can make no claim to honesty, but whose only ambition would seem to be to find a resting-place within the walls of a penetentiary, yet the government puts its goods in the possession of this man, thereby endorsing him as a man of character and of honor; his contract is his letter of credit, and with it he enabled to secure the confidence of its citizens. Armed thus he goes forth on his mission. He makes contracts for

the transportation of the government goods, and when his victims have rendered the service they agreed to perform, he neglects or refuses to pay them reasonable charges. What is the next step in this great act of injustice, if not fraud? The government is forced to dismiss its worthless contractor and endeavor to repossess itself of its goods. The railroad company says to the government, pay us our reasonable charges and we will deliver your goods to you, your contractor having
46 neglected and refused so to do. The government admits the services rendered, and that the charges are reasonable, but declines to pay. What next? The government, which have received the benefit of the services rendered, appears before a tribunal where justice is at least supposed to be administered, and asks it to become a party to a fraud by declaring, in effect, that it is a known prerogative of all governments and sovereignties to be excused for failing to be honest. I confess my sense of justice and of right revolts at such conclusions. But, notwithstanding that such is the case, I feel that it is not only my duty but that I am at least to some extent bound to respect and follow the decision rendered in the case of Dufolt vs. Gorman, before referred to. With this conviction, but with a mental reservation, I must and do declare that the law on the proposition submitted is with the plaintiff.

(Indorsed:) No. 135. The United States vs. The U. P. R. R. Co. Findings of court. Filed September term, 1878. J. W. Meldrum, clerk.

47 *Judgment.*

TERRITORY OF WYOMING,
County of Carbon, ss:

In the district court, second judicial district, September term, 1878.

THE UNITED STATES OF AMERICA
vs.
THE UNION PACIFIC RAILROAD COMPANY.

The court, upon consideration of facts and the law applicable thereto, finds for the plaintiff, The United States of America, and against the defendant, The Union Pacific Railroad Company.

It is therefore considered by the court that the plaintiff was at the commencement of this suit entitled to the immediate possession of the property in controversy, and that the same was wrongfully detained from plaintiff by the defendant. And that plaintiff do have and recover of and from the defendant possession of said property and the costs of this action, taxed at $, and that execution issue therefor.

To all which findings and judgment of the court the said de-
48 fendant, The Union Pacific Railroad Company, by its attorney, then and there excepted.

And thereupon, upon the same day, and within three days of the rendition of the said judgment, the said Union Pacific Railroad Company, defendant, filed in said cause its motion to vacate and set aside the findings and judgments therein, and to grant the said defendant, a new trial; which said motion was in the words and figures following, to wit:

Motion to set aside judgment and grant new trial.

TERRITORY OF WYOMING,
County of Carbon, ss:

In the district court of the second judicial district.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE UNION PACIFIC RAILROAD COMPANY, DEFENDANT. } Motion to set aside judgment and to grant a new trial to defendant.

49 Now comes the said defendant, The Union Pacific Railroad Company, and moves the court now here to vacate and set aside the findings and judgment heretofore rendered in this cause, and to grant the said defendant a new trial herein. And for cause therefor, says:

First. That the said findings and judgment is not supported by sufficient evidence.

Second. The the said findings and judgment is contrary to the evidence.

Third. That the said findings and judgment is contrary to law.

Fourth. That the said findings and judgment was rendered for the said plaintiff, The United States of America, when, by the law of the land, it should have been rendered for the said defendant, The Union Pacific Railroad Company. Wherefore the said defendant, The Union Pacific Railroad Company, prays the court now here to vacate and set aside the findings and judgments heretofore rendered herein, to grant the said defendant a new trial of this cause, and to restore said
50 the said defendant to all things that it has lost by reason of the judgment.

THE UNION PACIFIC RAILROAD COMPANY,
By W. R. STEELE, *Its Attorney.*

(Indorsed:) No. 135. The United States of America vs. The Union Pacific Railroad Company. Motion to vacate and set aside the judgment and to grant a new trial. Filed Sept. term, 1878. J. W. Meldrum, clerk. W. R. Steele, attorney for defendant.

And thereafter the said motion of the defendant to vacate and set aside the findings and judgment in the said cause and to grant the said defendant a new trial came on to be heard before the said court as of the September term, A. D. 1878, whereupon the said court over-
51 ruled and denied the said motion, and *and* the following order of judgment denying and overruling the same was duly entered of record, to wit:

Motion for new trial overruled.

TERRITORY OF WYOMING,
County of Carbon, ss:

In the district court of the second judicial district.

THE UNITED STATES OF AMERICA *vs.* THE UNION PACIFIC RAILROAD COMPANY.

And now comes on to be heard the motion of the said defendant, The Union Pacific Railroad Company, to vacate and set aside the findings

and judgment heretofore rendered herein, and to grant the said defendant a new trial herein.

Whereupon the said court after argument of counsel, and being fully advised in the premises, overrules and denies the said motion and refuses to vacate and set aside the judgment heretofore rendered herein and to grant the said defendant a new trial.

52 To all of which order, ruling, and decision the said defendant, by its attorney, then and there excepted.

Bill of exceptions.

And the said district court having by the agreement and stipulation of the parties rendered its judgment as aforesaid, as of the September term, A. D. 1878, of the district court aforesaid, and having by the agreement and stipulation of the parties heard the motion of the said defendant for a new trial as of the September term, A. D. 1878, of the said district court, and having overruled and denied the motion for a new trial as of the said September term, A. D. 1878, of the said court, to all which judgments, orders, and rulings in said cause rendering judgment in favor of the said plaintiff and against the said defendant, and in overruling and denying the motion of the said defendant to set aside and vacate the findings and judgments of the said court and to

53 grant the said defendant a new trial, the said defendant duly excepted at the time each and every of said judgments, orders and decisions were made as of the said September term, A. D. 1878, of the said court.

Now, on this 13th day of March, A. D. 1879, the said defendant, The Union Pacific Railroad Company, presents to the said court this its bill of exceptions in this cause, and by the stipulations, agreements, and consent of the respective parties to this cause it is ordered that this bill of exceptions be signed as of the September term, A. D. 1878, of the district court of the second judicial district of the Territory of Wyoming, within and for the county of Carbon, and made a part of the record in this cause.

All of which is accordingly done on the day last aforesaid, and the respective parties hereto by their counsel stipulate and agree that this bill of exceptions shall be treated in all respects as if it had been

54 signed, sealed and allowed in open court as of the September term, A. D. 1878, of the district aforesaid.

In testimony whereof I have hereunto set my hand and seal the day and year last aforesaid.

JACOB B. BLAIR, [SEAL.]
Associate Justice Supreme Court and
Presiding Judge 2nd Judicial District.

(Indorsed:) The United States of America vs. The Union Pacific Railroad Company. Bill of exceptions. Filed September term, 1878. J. W. Meldrum, clerk. W. R. Steele, attorney for plaintiff.

55 *Certificate.*

TERRITORY OF WYOMING,
County of Carbon, ss:

I, J. W. Meldrum, clerk of the district court of the second judicial district of Wyoming Territory, sitting within and for the county of Car-

bon, do hereby certify that the annexed and foregoing pages of writing are a true and correct transcript of the bill of exceptions in the case entitled The United States of America vs. The Union Pacific Railroad Company, No. 135, so full and entire as the same remains on file in said court.

Witness my hand and the seal of said court this 27th day of March, A. D. 1879.

[SEAL OF COURT.] J. W. MELDRUM, *Clerk.*

Which said writ of error and transcript of record is endorsed
56 on the back as follows, to wit: Sup. court. Doc. 1. No. 150. The Union Pacific Railroad Company, pl'ff in error, vs. The United States of America, def't in error. Writ of error and transcript of record. Filed April 3rd, 1879. J. W. Bremer, clerk. M. R. Steele, attorney for pl'ff in error.

And thereupon, on the same last said day, there was filed in the supreme court of the Territory of Wyoming the assignment of errors in said cause, in the words and figures following, to wit:

TERRITORY OF WYOMING, *ss:*

In supreme court.

57 THE UNION PACIFIC RAILROAD COMPANY, plaintiff in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

Assignment of errors.

The said The Union Pacific Railroad Company, plaintiff in error, now comes and files this its assignment of errors against the said The United States of America, defendant in error, arising in a case tried *tried* and determined at the September term, A. D. 1878, of the district court of the second judicial district of the Territory of Wyoming, within and for the county of Carbon, wherein the said The United States of America was plaintiff and the said The Union Pacific Railroad Company was defendant, and wherein the said The United States of America recovered judgment against The Union Pacific Railroad Company, and the said The Union Pacific Railroad Company, plaintiff in error, avers
58 that there is error in the said record and proceedings, and assigns the following errors of record, to wit:

First. That the findings of the said district are not sustained by sufficient evidence.

Second. That the findings of the said district court are contrary to the evidence.

Third. That the findings of the said district court are contrary to law.

Fourth. That the said judgment in the said district court was given for the said The United States of America, when by the law of the land it should have been given for the said The Union Pacific Railroad Company.

Fifth. That the judgment of the said district court is contrary to law.

The said The Union Pacific Railroad Company, plaintiff in error, there-

fore prays that the said judgment of the said district court may be reversed, and the said plaintiff in error restored to all things it has
59 lost by reason thereof, and for all further and proper relief.

THE UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error.
By W. R. STEELE, *Its Attorney.*

(Endorsed on the back as follows:) Doc. 1. S. C. No. 150. The Union Pacific Railroad Co., plaintiff in error, vs. The United States of America, defendant in error. Assignment of errors. Filed April 3d, 1879. J. W. Bremer, clerk. W. R. Steele, attorney for plaintiff in error.

60 And thereafter, to wit, on the 22nd day of May, A. D. 1879, at the regular March term, 1879, of our supreme court of the Territory of Wyoming, the said supreme court rendered judgment in said cause in the words and figures following, to writ:

Supreme court of Wyoming Territory, March term, 1879, Thursday, May 22nd, 1879.

THE UNION PACIFIC RAILROAD COMPANY, plaintiff in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

This cause came on for hearing upon the assignment of errors, the transcript of the record, and the papers and pleadings from the district court of the second judicial district of the Territory of Wyoming, within and for the county of Carbon, and was argued by counsel,
61 on consideration whereof the court find that there is error therein apparent upon the record to the prejudice of the said The Union Pacific Railroad Company, plaintiff in error.

It is therefore considered by the court that the judgment aforesaid be reversed and held for naught.

And the court further proceeding to render such judgment as the said district court ought to have rendered, find that at the commencement of the action in said district court the United States of America was not entitled to the immediate possession of the property taken from the said The Union Pacific Railroad Company on replevin, but that the said The Union Pacific Railroad Company had a lien upon said property and a special interest in the same, and was entitled to the possession of the same, and that the said the United States of
62 America wrongfully dispossessed the said The Union Pacific Railroad Company of the property taken on replevin in the action instituted in said district court.

It is therefore considered by the court that the said The Union Pacific Railroad Company, plaintiff in error, recover of the said The United States of America, and of James France and Edgar C. Snow, the sureties of said United States of America, upon its undertaking in replevin, the sum of six hundred and ninety-four $\frac{02}{100}$ dollars ($694.02), as well as its costs, herein expended, taxed at $, and that the said the Union Pacific Railroad Company have execution upon the judgment herein against the said James France and Edgar P. Snow, the sureties on the undertaking in replevin.

It is further ordered that this judgment be remanded to the district court of the second judicial district of the Territory of Wyoming,

63 within and for the county of Carbon, for execution, and that a special mandate be sent to said court therefor.

And thereupon on the said 22nd day of May, A. D. 1879, there was filed in said supreme court, in said cause, the opinion of the court in the words and figures following, to wit:

Territory of Wyoming, supreme court, March term, 1879.

THE UNION PACIFIC RAILROAD CO.
vs.
THE UNITED STATES OF AMERICA.

The opinion of the court was delivered by Mr. Justice Peck:

This is a suit of replevin brought by the Federal Government against the co. for merchandise, as property owned by the former, and to the immediate possession of which it was entitled. The defendant
64 plead the general denial, also, that it held possession under a carrier's lien when the merchandise was taken from it upon the writ of replevin. The facts were agreed upon, submitting to the district their legal effects, so that the issue was in form one of fact, in substance one of law. Its judgment was based upon this agreement. The parties stipulated that the case might be heard at chambers, and the judgment rendered as of the previous September term of 1878, and the judge who sat in the case below proceeded in form according to the stipulation. Whatever doubt might exist as to the power of parties to confer upon a district judge jurisdiction to try and decide an issue of fact in vacation, and render judgment as of an expired term, is met by the fact that in this instance he was trying an issue of law, for which purpose, under the statute of Dec. 15, '77, for facilitating the busness of the
65 district courts, the court was open and the September term unexpired when the case was heard and decided; and the circumstances of rendering the decision as of a prior day during the term is unimportant.

One Dwight J. McCann had a contract with the government, to whom the merchandise belonged, for the transportation of it from New York, or other point or points east of Omaha, to the White River Indian Agency in Colorado, where it was to be used in the Indian service; the defendant's road from Omaha to Rawlins was a proper route for transportation for the purpose of getting the property to its destination; he contracted with the co. to transport from Omaha to Rawlins accordingly; under the contract delivered the property to the co. at Omaha, and the latter duly carried it to Rawlins, and there stored it ready for delivery; and for the carrying and storage was legally entitled to
66 be paid $588.16, no part of which sum had been paid or tendered to it when the writ of replevin was executed.

As against McCann, had the property been his the co. would have had the usual common carrier's lien upon it for those charges.

The government, claiming that its property was exempt from such a lien, refused to recognize the co. demand and replevied goods the value of which, as per the replevin appraised, was $4,951. The transportation from Omaha to Rawlins and the contract for it were ne'ssary acts on the part of McCann in the performance of his contracts with the government; and nothing appears to indicate that when the writ was executed, and up to that time, he was not in the due discharge of the latter contract; and it must be taken, if that can affect the ques-

tion to be decided, that he was then and until then in the proper discharge of his duty to the government.

67 In considering the questions presented by the record we will first assume that government property is exempt from the common carrier's lien. The government can retain or waive the exemption at will. Had it transported the merchandise through an agent the property would have remained under its control, the possession of the agent would have been its possession, the contract of carriage would have been directly between it and the carrier, and thus the exemption would have attached and been retained.

It transported the merchandise through a contractor. The contract measured the relations of the parties and subjected them to reciprocal obligation, precisely as it would have done had they both been private individuals. Imposing upon him the duty to transport, it incidentally conferred upon him the right to adopt such methods and to make such sub-contracts of carriage as should be necessary to perform

68 that duty; therefore to make such sub-contracts according to the established rules of carriage, the primary contract was an irrevocable authority from the government to him to that end, and to that extent an authority upon which he and all parties dealing with him within its scope might rely. Receiving possession from the government, he received it upon the faith of his contract with it. Contracting with the railway co., and redelivering the property to it, the sub-contract was made and by the co. performed upon the faith of the primary contract, all the incidents of common carriage, among them the usual lien for charges attaching; thus the government waived its exemptions, is subject to the lien, and powerless to disturb the rights which have arisen between McCann and the co. Can anything be more incongruous than that the government should hold its

69 contractor to his obligation and have the right to frustrate the very methods which are indispensable to the performance of that obligation? Governments, as individuals, are held to the duty of good faith, and good faith forbids.

But the exemption does not exist. The exemption would incalculably cripple the public service, the liability would equally promote it; no consideration of justice or policy favor, *or* every consideration of justice and policy forbids the exemptions. The liability enlarges, the *the* exemption narrows sover'ign action; the liability, not the exemption, is a privil*edge*, and therefore an attribute of sover'ignty. The learned counsel for the defense in error has submitted to us no adjudication to the contrary which we should follow as a guide or respect *or* advisory; and we are convinced that such an adjudication does not exist. On the other hand, all the anal*a*gies of the commercial and marit*i*me law

70 and the federal decisions under that law are directly the other way.

In 9 Whea., 409, The St. Jajo de Cuba, it was decided in 1824 that seamen and material men who had served and supplied the ship after her seizure as a slaver had, respectively, liens upon her against the United States for wages and supplies, and that she stood pledged to them accordingly. The case of The United States against Wilder, reported in 3 Sumner at page 308, is in point. The government shipped supplies for the public service by the schooner Jasper from Boston to New York under the terms of the common bill of lading, by which the goods were deliverable on payment of freight. The vessel went ashore on Block Island upon her voyage; expense was consequently incurred in saving the cargo, constituting a case of general average in favour of

the owners and master of the Jasper, who struck an average of the expense among the freighters, the government included, and re-
71 fused to deliver the clothing to the latter on its refusal to provide for its share of the average. The latter conceded that the average was correct and that it was liable for the proportion claimed of it, but denied that its property could be retained for payment; that is, denied that the vessel had a lien against the government for contribution. The suit was brought and the claim then presented to the United States circuit court for decision, and the claim of lien was sustained, the judges concurring. In rendering the decision Judge Story said: "The present case is not one arising under contract but by operation of law, and, if I may so say, in invitum. It is a case of general average, whereas in a case of salvage the right of the party arising from sacrifices made for the common benefit or labor and services performed for the common safety. Under such circumstances the general maritime law enforces a contribution, independent of any
72 notion of contract, upon the ground of justice and equity, according to the maxim, qui sentit commodum, sentire debet et onus, and it gives a lien in rem for the contribution." If this is accurate reasoning, it equally applies here. The present case may in like manner be said to arise not by contract but by operation of law; the freight money to be an incident to the office of the carrier, who is a public servant compelled to carry and to insure, and the commercial law, which creates the office and defines its incident of duty and right, to enforce the payment of the freight money by a lien in rem. But, with unfeigned respect for that judge, we dissent from his reasoning as unsound, not as frustrating the principles on which he based the decision but as weakening its application. The rights to general average and its accompanying lien exist at the maritime law; are abstract and
73 dormont in the absence of a contract of shipment; by a contract of shipment become active and attach, and in case of a loss creating a general average the contract is utterly silent about them, they enure to the carrier, and manifestly it can be only by contract. So the rights to the freight money and to its accompanying lien exist at the commercial law; are abstract and dormont in the absence of a contract for carriage; by such contract are invoked, and attach, tho' the contract is utterly silent respecting them, and are manifestly contract rights.

But whether the lien attaches under a principle of law unaided by contract or under a contract, into the substance and construction of which it enters, it is still a lien binding the sovereign; and it none the less binds the sovereign if imposed by contract. Thus the United States vs. Wilder furnished a threefold sanction of the idea that
74 the Federal Government is subject to the carrier lien. The case responds to the voice of justice and sound policy, it accords with the analogy of the law, and it has the imprimature of two judges, as to one of whom, Mr. Justice Sprague of the district court, it may be said that it would be difficult to find a more reliable member of the American judiciary, and as to the other of whom, Mr. Justice Story, it may be said that for conception, for exposition, for administration of the commercial law, of which bailments are a part, he was the most accomplished jurist and judge in our language. This case was decided in '38 and was relied upon as authority, fully adopted by the Supreme Court of the United States in the case of *the* The Sirens, 7 Wallace, 152 and The Doris, 10 Wallace, 15, decided respectively in 1868 and 1869; in one of which
75 cases it was adjudged that the government was subject to the lien of a maritime tort, and in the other to the lien for salvage, the

same as a private individual is. The books show that every description of maritime lien, whether arising by contract tort or otherwise, other than the carrier's lien, affects the government and citizens alike; that these liens exist from the necessities of commerce, and the necessities of commerce are the necessities of the public service. It is not simply difficult to perceive, it is rationally impossible to perceive why the same rule should not apply to the carrier's lien. In the course of his opinion in 3 Summer, Judge Story said: "That in all cases of contract made by the United States exemptions from the ordinary lien attached thereto by the maritime law is more than I know or am prepared to admit. Take the case of *is* shipment of goods like the present, on board of a coasting vessel for transportation from one port to another under the terms of a
76 common bill of lading, by which the goods are deliverable to the consignee or his assigns, he or they paying freight; I must say that I am not prepared to declare that the ordinary lien for freight does not attach in such a case, upon the very footing of the terms of the contract, as it would upon a shipment by a private person."

The point which was the subject of this remark was not before the judge for decision, and was not decided; but the opinion as an opinion is strong authority, because of its author, and is directly in point, for that case and the present are precisely alike in the matter of a freight lien; the fact that in that case the bill of lading required the freight to be paid before delivery, and the fact that in this one there is no evidence that the condition was expressly removed by the co., constituting an immaterial difference, inasmuch as the reservation is only what the law implies in its absence. In disposing of this sub-
77 ject, we consider that the entire transaction, from the making of the original contract the recaption of the property, to the place in a state of peace, whether in a state of war would constitute an exception is a matter which we are not required to, and do not, determine.

The counsel for the government claims that the district court could render a judgment for but not against it. We have listened with attention and respect to his argument advanced in favor of this proposition, and candor requires us to admit that he has presented it as well as it could be presented; but candor also compels us to say that the proposition is throughout and throughout a fallacy. To what consequence does the proposition lead? The United States may invoke the jurisdiction of the court; it may accept that which does, and discard that which does not, accord with its supposed interests. It may dictate the exercise of the administration of the law. It is not
78 bound by the rules of equal justice. It is a privileged suitor. The district court having rendered a judgment against it, this court must reverse; having rendered one for it, this court can only affirm. It can sit in appeal, must mechanically obey, cannot revise. Nay, further, having brought the suit and effected a caption, its aim is accomplished. It needs no judgment, for but one judgment can be rendered in the case, and that in its favor. If, having made the caption, it neglects to prosecute the writ, a motion to dismiss for want of prosecution will be unavailing. Still further, *still further*, the demand in the writ for judgment is meaningless, the undertaking of the sureties without force, the writ is superfluous, and the suit farcical, because it is intended to effectuate under the forms of law what can as well be accomplished by the violent hand under an irresponsible
79 will. Does not the proposition result in a pure reductio ad absurdum? The Federal Government cannot at common law be

drawn into court. This is a sovereign prerogative intended to protect it not only from rapacious litigation, but from just judgments as well, because the latter could be employed to disturb its due control of its property. On the same ground suit cannot be instituted against the property of the government if the bringing or prosecution of the suit requires the issuance of process against the government or the disturbance of its possession of its property. The exemption is personal, and the will retain is a will to waive it, in the exercise of sovereign interests; when it sues does waive the privilege. Invoking the jurisdiction of the court, it submits to that jurisdiction, presenting a claim for its adjudication; it asks that the claim be adjudicated upon its merits, and allowed or rejected accordingly. But the waiver is held to be limited so as to guard the government against personal
80 judgments. Within this limitation of the waiver judgment may be obtained against it. If it sues it is subject to the defense of offset up to the amount of whatever claim it shall establish; a defense which does not controvert the claim, but is in the nature of a limited or quasi cross suit against it; allowed not to the extent of affirmative remedy beyond, but only to the extent of defeating that claim. (7 Pet. 1, U. S. v. McDaniels; 7 Tet. 18, U. S. v. R ; 9 Pat. 319, U. S. v. Robeson.) It is true that this right of offset is created by statute, but it is also true that the statute in creating it recognizes this principle of waiver. At common law, however, a suit by the government subjects its claim to any defense founded upon a defect in the claim itself. Such a defense inheres in the suit the power to confer the right of defense, and invokes the full jurisdiction of the court to both sides
81 for the purpose of disposing of it according to its merits. So far this is the present case. The defense here made is founded on defect in the plaintiff's claim. But the case goes further. It is a suit in rem. The Supreme Court of the United States applies this rule to all proceedings in rem instituted by the Federal Government, namely, that the institution of the proceedings is a waiver of its exemption from suit either against itself or its property, and opens the subject matter of the proceeding to all opposing demands, standing towards defendants and claimants precisely like a private suitor, except as to costs and affirmative relief beyond the thing in controversy; the theory of which rule is that the government asks for and can obtain only what belongs to it out of the property. Upon this rule that court disposed of the cases of the St. Jaco de Cuba, United States vs. Wilder, The Sirens, and the Davis, each of which was a proceeding in rem instituted
82 by the United States, and in each of which an adversary lien was allowed. The case of the United States v. Wilder was commenced in trover, but converted into a suit of detinue by a stipulation that, if the government was exempt from the lien in question, "the defendant should be defaulted, and the clothing immediately given up." And in the case of The Davis, one Douglass libelled her cargo for salvage, and the government intervened as owner, denying the claim, and becoming thus an actor in the controversy. According to this rule, the present suit being a proceeding in rem, the right of the United States is subject to the lien of the Union Pacific Railroad Co. Were the suit regulated by the common law, the judgment would be for a return of the property—exact restoration; but it is regulated by the statute, which, at sections 175 & 180 of the civil code, provides for an
83 undertaking with surety to the defendant in at least double the amount of the property, conditioned that the plaintiff shall duly prosecute the action, and pay all costs and damages that shall be

awarded against him, which undertaking need not be signed by the principal, but must be taken before the property is delivered to the plaintiff and be deposited in court; and further provides that the property having been delivered to the plaintiff, when the jury shall find for the defendant, they shall also find whether he had the right of property or only of its possession at the commencement of the suit, and finding either for him, shall assess his damages, including his attorney's fees, for which and costs of suit judgment shall be rendered in his favor against the plaintiff and his sureties. Thus the undertaking is a substitute for the property, and is to be charged with the judgment under the distinction above explained, and by which the
84 record would be construed. A judgment for the defendant in a suit of replevin brought upon this statute would, were the plaintiff a private person, be a general and personal judgment, also a judgment specifically against the undertaking; but the plaintiff being the government, it would be a judgment only against the undertaking, and, tho' we direct such a judgment to be in form entered, we do not mean to say that it would not suffice to limit it in form to one against the surety; for whatever its form, whether entered against the government and surety or against the latter only, it would in effect be a judgment against the surety alone. At the common law the judgment could not embrace costs, but the government by instituting the suit and furnishing the requisite security elected to provide a fund for the costs, and to accept an adverse judgment, charging that fund with the
85 costs, it is therefore consistent to embrace the costs in the judgment.

In the Territorial practice an attorney is what the common law intends by the two capacities of attorney and counsellor; the terms attorney fees, in section 180, means the reasonable fees earned in the district court in the performance of attorney and counsel services on the defense. At the common law such fees could not be embraced in a judgment for the defendant, but under the statute the plaintiff is charged with them as a part of the damages, for the same reason that it is chargeable with the costs. Were we to send the case to the district court we should direct it to embrace in its judgment the co. attorney's fees, fixed at a reasonable amount upon the principal above stated. The company, however, waiving those fees, judgment is rendered for it for $588.16, and interest from November 20, 1877, as damages, and
86 for the costs of the district court and those of this court.

Which said opinion is endorsed on the back as follows: Doc. 1. No. 150. Territory of Wyoming. supreme court, March T., 1879. The Union Pacific Railroad Co. vs. The United States of America. Opinion of the court by Mr. Justice Peck. Filed May 22nd, 1879. J. W. Bremer, clerk.

87 And thereafter, to wit, on June 27th, 1879, there was filed in the clerk's office of the Supreme Court a citation in said cause, in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

To the Union Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at Washington on the second Monday in October next, pursuant to a

writ of error filed in the clerk's office of the supreme court of Wyoming Territory, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error described and mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

88 Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 27th day of June, in the year of our Lord one thousand eight and seventy-nine.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

TERRITORY OF WYOMING,
County of Laramie, ss:

I, Edward P. Johnson, being duly sworn, do say that I served the above citation by delivery a copy thereof to W. R. Steele, attorney of record for the def't in error, this 27th day of June, 1879.

E. P. JOHNSON.

Subscribed and sworn to before me this 27th day of June, 1879.
[SUPREME COURT SEAL.] J. W. BREMER,
Clerk Supreme Court.

89 Which citation is endorsed on the back as follows: Doc. 1. No. 150. The United States vs. The Union Pacific Railroad Company. Citation filed June 27th, 1879. J. W. Bremer, clerk.

And on the same last said day there was filed in said Supreme Court, in said cause, and affidavit as to value of matter in dispute, in the words and figures following, to wit:

In Supreme Court of the United States, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE UNION PACIFIC RAILROAD COMPANY, def't in error.

90 Error to the supreme court of Wyoming Territory.

TERRITORY OF WYOMING,
County of Laramie:

I, Edward P. Johnson, being duly sworn, do depose and say that I am the attorney for the United States in the Territory of Wyoming, and that the value of the matter in dispute in this cause, exclusive of costs, exceed the sum of one thousand dollars.

EDWARD P. JOHNSON.

Subscribed and sworn to before me this 27th day of June, 1879.
[SUPREME COURT SEAL.] J. W. BREMER,
Clerk Supreme Court.

Endorsed on the back as follows: Doc. 1. No. 150. The United States vs. The Union Pacific Railroad Co. Affidavit as to value of matter in dispute filed June 27th, 1879. J. W. Bremer, clerk.

91 TERRITORY OF WYOMING, *ss:*

I, J. W. Bremer, clerk of the supreme court of the Territory of Wyoming, do hereby certify that the foregoing pages contain true and correct copies of the transcript, assignment of errors, journal entry of judgment, opinion of the court, citation, and affidavit as to value of matter in dispute in the case entitled The Union Pacific Railroad Company, plaintiff in error, vs. The United States of America, defendant in error, so full and entire as the same remains on file and of record in the clerk's office of said supreme court.

Witness my hand and the seal of said supreme court, hereto attached, this 28th day of June, A. D. 1879.

[SEAL.]

J. W. BREMER,
Clerk Supreme Court Wyoming Territory.

92 TERRITORY OF WYOMING, *ss:*

I, J. W. Fisher, chief justice of the supreme court of the Territory of Wyoming, do hereby certify that J. W. Bremer, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the clerk of said supreme court of said Territory and the keeper of the records and seal thereof; and that said clerk was duly appointed and qualified to office, and that all his official acts as such clerk are entitled to full faith and credit in all courts of record and elsewhere; and that the seal attached to said certificate is the seal of said supreme court, and that his said certificate is in due form of law, and that this signature thereto subscribed is genuine.

93 Given under my hand at Cheyenne City this 28th day of June, A. D. 1879.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

TERRITORY OF WYOMING, *ss:*

I, J. W. Bremer, clerk of the supreme court of Wyoming Territory, do hereby certify that J. W. Fisher, whose name is subscribed to the foregoing certificate, now is, and was at the time of signing the same, the chief justice of the supreme court of Wyoming Territory, duly qualified and commissioned as such chief justice, and that his signature thereto is genuine.

Witness my hand and the seal of said supreme court, hereto attached, this 28th day of June, A. D. 1879.

[SEAL.]

J. W. BREMER,
Clerk Supreme Court Wyoming Territory.

(Indorsement on cover:) No. 214. The United States, plaintiffs in error, vs. The Union Pacific Railroad Company. Wyoming Territory su'p. court. Filed 11th July, 1879.

SUPREME COURT
FILED
MAR 3 1882

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES
vs.
THE UNION PACIFIC RAILROAD COMPANY. } No. 214.

BRIEF FOR THE UNITED STATES.

This was an action of replevin, brought in Wyoming Territory by the United States against the company for certain goods, &c., that had been transported by the latter, and a delivery of which had been subsequently refused, upon the ground of *a lien* for the price of transportation. Upon the trial it had appeared that one McCann had had a contract with the United States for the transportation of the goods, &c., to the White River Indian agency, and that he had thereupon employed this company as carriers.

An agreed statement of facts is to be found upon pages 9, &c., of the record.

The question submitted thereupon was whether under the circumstances the articles were liable to the lien set up.

Two elaborate opinions upon this question are to be found within the record at pages 11, &c., and 19, &c.

The cases of *The Sirens* (7 Wallace 152), and *The Davis* (10 Wallace 15), are cited in the opinion of the Supreme Court of the Territory; and that of Dufolt *vs.* Gorman (1 Minn., 301), in that of the district court. In the latter, a case of transportation like that in the present record, an opinion was rendered that property belonging to the United States was not subject to a lien.

For error is assigned:

The decision below that property of the United States, under the circumstances detailed in the agreed statement, was subject to a lien.

This assignment is submitted to the judgment of the court.

S. F. PHILLIPS,
Solicitor-General.

FILED
MAR 3 1892

Supreme Court of the United States.

No. 214.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILROAD COMPANY.

In Error to the Supreme Court of Wyoming Territory.

BRIEF FOR DEFENDANT IN ERROR.

I.

This court has not jurisdiction in the present case because the value of the matter in dispute, exclusive of costs, does not exceed one thousand dollars. (Rev. Stats., sec. 702.)

True, an affidavit is filed (R., 26) attempting to make the value in dispute exceed $1,000.00, but as against the record the affidavit falls, for it is contradicted by the following facts of the record, which show that the matter in dispute was no more or other than the value of the freights and storage for which defendant claimed a lien and the right to detain the goods, to wit:

1. The answer (R., 7 and 8, fol. 21, 22 and 23) *confines* the matter in dispute to said lien for $588.16.

2. The agreed facts show the same thing. (R., 9, 10 and 11.)

3. The findings by the court in effect find the same thing.

4. The judgment of the Supreme Court, made in accordance with the prayer of the answer (R., 8,) and with the agreement of the parties, (R., 10, fol. 30,) confined the matter in dispute—the judgment—to the said sum of $588.16 and interest, making the judgment for $694.02. (R., 19.)

Here, then, the entire record being looked to conclusively shows that the matter in dispute did not exceed one thousand dollars; and when the entire record shows this, the jurisdiction fails.

Tintsman *v.* Nat. Bank, 100 U. S., 6.
Banking Association *v.* Insurance Co., 102 Id., 121.
Gray *v.* Blanchard, 97 Id., 564.
Schacker *v.* Insurance Co., 93 Id., 241.

II.

But assuming the court to have jurisdiction, then the record, under the agreed facts, (R., p. 9–10,) presents the single legal question, to wit, Does a common carrier, who transports for hire the property of the United States, acquire in such property the ordinary carrier's lien in such sense that the government cannot refuse to pay the freights and yet lawfully take possession of the property?

We submit that where the United States parts with the possession of its property, putting it into the possesion of a bailee, whether a carrier or otherwise, under such conditions that, as against a private person, a lien would attach to the bailment, there the government, as to that *res* so parted with, has voluntarily waived its sovereignty, and can only oust the possession so given to the bailee by such resort to the courts as a private bailor can have, and on the same terms as affecting the government's right of

action. If a private bailee could, under the same facts, only have resort to replevin after payment of a bailee's lien, then so also can the United States only maintain replevin on the same terms. And, also, the government having elected to go to law regarding the *res*,—the bailment,—it elects to go under the same conditions as a private suitor. In such a suit the "sovereignty is" (to adopt the words of this court, 6 Otto, 36,) "in nowise involved."

These principles are, we think, thoroughly settled by this court.

First take matter as to whether, as against the government, a lien attached to these goods for their affreightment. This is certainly decided in the case of The Davis, 10 Wall., 15, and is recognized and repeated in many others, as Carr *v.* The United States, 8 Otto, 433–439.

In the able opinion of Justice Miller in the "Davis" the cases are reviewed, and the principle here in question clearly stated. The entire question in the present case is, we think, covered by the last two sentences in this opinion of Justice Miller:

"The United States, without violation of the law by the marshal, was reduced to the necessity of becoming *claimant and actor* in court to assert her claim to the cotton. Under these circumstances, we think it was the duty of the court to enforce the lien of the libellants for the salvage before it restored the cotton to the custody of the officers of the government."

So, too, the additional and kindred rule that when the government so elects to become a suitor or actor in the courts for enforcement of some property right, there the government submits to all jurisdictions, judgments, and orders which the law of the court prescribes as necessary elements or incidents of the power or jurisdiction which the government so invokes—this the same as if it were a private person.

In the present case, the government having elected to resort to replevin in a court where every plaintiff in re-

plevin must give a certain bond and surety, and where the court was authorized to give judgment on such bond in a certain event, thereby the government gave jurisdiction to the court to render the judgment which was in this case rendered, at least against the sureties on the replevin bond. If the court below went beyond its power in including the United States in the judgment, this court will simply modify the judgment under sec. 701, Rev. Stats. (Insurance Co. *v.* Peaggio, 16 Wall., 387.)

The language of Justice Greer in Elliott *v.* Van Voorst, 3 Wall. C. C., 299, that "when the Government of the United States became a partner in a trading corporation," * * * "it divested itself, so far as concerned the transactions of that company, of its sovereign character, and took that of a citizen, and consequently its property and interests *are subject to the decrees and judgments* of the courts equally with that of its co-partners," is but another application of the principle stated in the case of the "Davis," where this court, in approving the law of "The Light Boats," 11 Allen, 157, says that "proceedings *in rem* to enforce a lien against the property of the United States are *only* in cases where, in order to sustain the proceeding, the possession of the United States must be invaded." And these holdings are also but another form of stating the principle declared by this court in United States *v.* Bank of Metropolis, 15 Pet., 392, and multitudes of other cases, (see 6 Otto, 36,) that the United States, when it embarks in a law-suit regarding property rights in specific property, "has all the rights and *incurs all the responsibilities of individuals*," placed in the same relations to the *res* which the suit is meant to dispose of.

And nowhere do we find more carefully stated this rule, that when the government brings a subject-matter into the courts for adjudication, it thereby submits the government to liability to the same orders, judgments, and decrees regarding that subject-matter as if the government

were an individual, than by Justice Field in United States *v.* Flint, 4 Sawyer, 42.

He said:

* * * "But if we admit that the Attorney General is authorized to direct the institution of a suit like the present in the name of the United States, and that the District Attorney has been thus directed, his power in this respect must be exercised in subordination to those rules of procedure and those principles of equity which govern private litigants seeking to avoid a previous judgment against them. *The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant, they waive this exemption, and stand on the same footing with private individuals.*"

SHELLABARGER & WILSON,
Att'ys for Defendant in Error.